In order to prevent excessive backloading, plans must comply with one of three minimum accrual schedules that require a plan to give ratable credit for all of a participant's years of participation.[4] In this case, the Plan satisfies the 133-1/3 percent accrual schedule set forth in ERISA Section 204(b)(1)(B), 29 U.S.C. § 1054(b)(1)(B), which measures the accrual rate under a plan for a given year against the accrual rate for all subsequent years. (Pet'r App. at 37a). The test is satisfied if a subsequent year's accrual does not exceed 133-1/3 percent of a prior year's accrual. For a plan such as this Plan that provides an annual unit rate of benefit accruals, such as $55 per year of credit, this method requires either a single benefit rate or, if there are multiple rates, that the rate in any later year not be more than 133-1/3 percent of the rate in any earlier year. Stephen R. Bruce, *Pension Claims: Rights and Obligations* (2d ed. 1993) (reproduced at A-804 to A-805); Felicia A. Finston & Stephen J. Gilles, 351-3rd T.M., *Plan Qualification – Pension and Profit-Sharing Plans*, at A-52 (reproduced at A-796).

The concern underlying ERISA's backloading rules is not implicated by split-rate provisions which do not tie benefit increases to an employee's length of service, but instead merely limit the retroactive application of benefit

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(N.D. Ill. Sept. 30, 1999); *DeVito v. Pension Plan of Local 819 I.B.T. Pension Fund*, 975 F. Supp. 258, 268 (S.D.N.Y. 1997); *Carollo v. Cement and Concrete Workers Dist. Council Pension Plan*, 964 F. Supp. 677, 681 (E.D.N.Y. 1997).

4. *See* Section 204(b)(1)(A)-(C) of ERISA, 29 U.S.C. § 1054(b)(1)(A)-(C) (setting forth three alternative accrual schedules: the 3 percent accrual schedule, the 133-1/3 percent accrual schedule, and the fractional schedule).

increases. This conclusion was confirmed in *Langman v. Laub*, 328 F.3d 68 (2003), *cert. denied*, 540 U.S. 1107 (2004). In that case, the Second Circuit stated:

> [Plaintiff] asserts that since the $50 benefit rate used to calculate his pension benefits for the later years is more than 133 1/3 percent of the benefit rate used to calculate his pension benefit for the earlier years, defendants' calculation – and, more generally, the [split-rate] provisions on which it is premised – violates the 133 1/3 percent test.
>
> This argument, however, completely misapprehends the acknowledged purpose of the 133 1/3 percent test, which is to prevent . . . "backloading of benefits". . . . [T]he test applies to how a given plan operates at a given time and prevents it from being unfairly weighted against shorter-term employees; but it is irrelevant to across-the-board increases in benefit rates made at some future time on behalf of all current employees regardless of period of service. Indeed, it would be a strange rule that would prohibit a fund from making more than a one-third increase in its across-the-board benefit rate unless that rule were retroactively applied to all former employees; yet this would be the effect of plaintiff's interpretation. Accordingly . . . defendants did not violate the 133 1/3 percent test by pro rating his monthly benefit in accordance with the Plan's [split-rate] provisions.

Id. at 71-72 (citations omitted). *See also Campanella v. Mason Tenders' Dist. Council Pension Plan*, 132 Fed. App. 855, 857 (2d Cir. 2005) (applying *Langman* to dismiss

backloading allegations); *Melvin v. U.A. Local 13 Pension Plan*, 131 Fed. App. 737, 739 (2d Cir. 2005) (same); *LaFlamme v. Carpenters Local # 370 Pension Plan*, 127 Fed. App. 3, 15 (2d Cir. 2005) (same).

C. The District Court's Summary Judgment Decision

King's attempt to have his earlier credits retroactively increased to the rate in effect more than 20 years later focused on the date that the split-rate amendment was added to the Plan, a sharply disputed issue in the proceedings below. Specifically, Respondents maintained that the split-rate provision applied to all pension types offered under the Plan (Early, Standard, Normal, Vested) beginning in 1989, whereas King argued that in 1989 the split-rate provision applied to only one type of pension, the so-called Vested Pension, and did not become applicable to the Standard Pension that he was awarded until 1995. (Pet'r App. at 10a-13a, 24a). King also claimed that because he had already accumulated 21 pension credits in 1995 when he believed the amendment first applied to the Standard Pension, and the unit benefit rate at that time was $50, his accrued benefit in 1995 was $1,050 (21 credits multiplied by $50). Therefore, even though he had not worked under the Plan since 1976, King claimed that applying the $8.50 rate to his first 21 credits unlawfully reduced his accrued benefit. (*Id.* at 27a-28a).

The District Court accepted King's position that the split-rate provision first applied to the Standard Pension in 1995. However, because King had not returned to Covered Employment until 1998, this factual determination did not help him. The District Court held instead that King was not entitled to the $50 rate in effect in 1995 because of a different

section in the Plan that provided that a participant's benefit is determined under the Plan in effect when he separates from Covered Employment. Accordingly, the District Court held that, until King returned to Covered Employment, the $8.50 rate applied to his earlier service under the Plan, and his benefit was not cut back by the 1995 split-rate amendment. (*Id.*)

King also argued that the application of the two different rates, $8.50 and $55, to calculate his benefit constituted unlawful backloading because the $55 rate was more than 133-1/3 percent of the $8.50 rate. The District Court held that this argument was foreclosed by *Langman*, which was decided after the parties had moved for summary judgment, and rejected King's effort to distinguish *Langman* based on the repair provision which was not at issue in *Langman*. (*Id.* at 32a-37a).

King also challenged the Joint Board's response to King's pre-litigation requests for documents. Specifically, King had requested "the 1992 Pension Fund Plan Document," to which the Joint Board responded by providing the Plan document that was drafted in 1995 and effective retroactively to 1989 in compliance with Internal Revenue Service regulations. It is undisputed that there is no Plan that bears a 1992 date. In addition, in response to King's questions about the split-rate amendment, the Joint Board provided King with a copy of the applicable split-rate section, stating that "[t]he appropriate provision was adopted . . . in 1989." (*Id.* at 39a-41a).

The District Court agreed with King that the Joint Board's response regarding the date of the amendment was misleading to the extent that it implied that the split-rate provision applied to the Standard Pension in 1989 since that

was contrary to the District Court's factual finding (made in 2003) that the provision did not apply to the Standard Pension until 1995. However, because King had not relied on the Joint Board's response, the District Court rejected his fiduciary breach claim under ERISA. The District Court also rejected King's request for statutory penalties under ERISA Section 502(c), 29 U.S.C. § 1132(c), based on the production of the Plan document drafted in 1995 but made retroactive to 1989 in response to King's request for a 1992 plan document. The District Court declined to award any penalties because the Joint Board had, in fact, and as a matter of law, met its disclosure obligations under ERISA Section 104(b)(4), 29 U.S.C. § 1024(b)(4). (*Id.*).

D. The Second Circuit's Unpublished Summary Order

On appeal, King did *not* challenge the District Court's holding that *his* benefit was not unlawfully reduced or improperly backloaded, but instead raised for the first time the argument that two *nonparties*, so-called Pensioner #1 and Pensioner #2, respectively, had their benefits unlawfully reduced and backloaded. Notably, King had not sued as a class action or on behalf of anyone other than himself, none of his three complaints requested an adjudication concerning Pensioner #1 or #2, and neither nonparty ever appealed their benefit awards to the Joint Board. In fact, the only relevance of Pensioner #1 and #2 in this litigation is that Respondents produced worksheets of their work histories and benefit calculations in discovery.

The Second Circuit affirmed the District Court's judgment in an unpublished summary order. With respect to the cut-back claim, the Court of Appeals applied fundamental

standing principles set forth in *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982), to hold that since King's benefits had not been decreased, King had not personally suffered any injury and, therefore, lacked standing to argue about Pensioner #1. (Pet'r App. at 3a). With respect to the backloading claim, although the Second Circuit did not comment on the District Court's holding that the repair feature of the split-rate provision was permissible under ERISA, the Court of Appeals rejected the claim due to King's lack of standing. It stated that because King had only returned to Covered Employment for one year he was "decades away from being deterred from leaving employment by the incentives created by the 'repair' provision," noting that "[i]t is the impact of such deterrence that would be the basis for his standing to raise this issue." (Pet'r App. at 3a-4a). Finally, the Court affirmed the District Court's rejection of King's fiduciary breach claim because of King's admitted lack of reliance. The Court did not address King's claim for ERISA Section 502(c) penalties. (*Id.* at 4a).

REASONS FOR DENYING THE PETITION

I. The Unpublished Decision Lacks Precedential Value

The Second Circuit's decision is an unpublished summary order. Under the Second Circuit's rules, summary orders "do not constitute formal opinions of the court . . . and shall not be cited or otherwise used in unrelated cases before this or any other court." Rule § 0.23 of the Second Circuit's Local Rules Relating to the Organization of the Court. For this threshold reason, review is not warranted. Since the Second Circuit itself does not view the case as an important matter and expressly prohibits any citation of the order, the decision cannot create any genuine conflict nor did it articulate a new principle of law on standing.

II. The Unpublished Decision Does Not Create A Circuit Conflict

King tries to support his Petition by alleging two conflicts, the first concerning whether reliance or prejudice is required to prevail in benefit claim cases based on faulty SPDs, and the second involving standing under ERISA. As shown below, the first conflict is not presented in this case, and the second conflict is spurious.

A. The "Faulty SPD" Conflict Is Not At Issue In This Case

The courts below dismissed King's fiduciary breach claim based on the Joint Board's allegedly misleading response to King's document request because King did not rely on the alleged misrepresentation. Petitioner fails to identify any conflict on the question of whether reliance is required for a fiduciary misrepresentation claim. Instead, Petitioner identifies an irrelevant circuit court conflict on whether ERISA requires a participant to demonstrate detrimental reliance upon deficient summary plan descriptions ("SPDs") in order to recover benefits. *See, e.g.*, *Burke v. Kodak Retirement Income Plan*, 336 F.3d 103, 112 (2d Cir. 2003), *cert. denied*, 540 U.S. 1105 (2004) (reviewing conflicting circuit court holdings in faulty SPD cases).

The conflict described in *Burke* does not support the Petition for the simple reason that this case is not about a faulty SPD. In this case, the Joint Board's allegedly misleading representation was its representation that the split-rate amendment was added to the Plan for Standard Pensions in 1989. King has never alleged that any of the Plan's SPDs were deficient, and neither court below made any such finding

as reflected in the fact that neither decision cited any faulty SPD cases. Therefore, resolving the circuit court conflict on whether reliance is required to obtain benefits based on a faulty SPD would not dispose of the case at bar and would not benefit King in any way.

B. No Conflict Exists On The Injury-In-Fact Requirement Of Standing

Petitioner's claim that the Second Circuit's order creates a conflict with another circuit is mistaken. The Panel's decision merely applied fundamental well-settled constitutional principles of standing as articulated in this Court's decision in *Blum* that Article III of the Constitution requires a plaintiff to show "'that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant" in order for a federal court to exercise jurisdiction over a dispute, and that "[i]t is not enough that the conduct of which the plaintiff complains will injure *someone*." *Blum*, 457 U.S. at 999 (internal citations omitted) (emphasis in the original). The summary order does not distinguish or reject, either overtly or implicitly, any appellate precedent or impose any new limitations on standing. The cases cited by King as demonstrating a conflict are readily distinguishable on their facts and do not require a different result than that reached by the Second Circuit.

In *Johnson v. Allsteel, Inc.*, 259 F.3d 885 (7th Cir. 2001), the principal case relied upon by King to demonstrate a conflict, the plan at issue could be amended only by the agreement of both the plaintiff's employer and his union. Disregarding this limitation, the employer amended the plan without the union's consent to give the company the unilateral right to amend the plan, and then it amended the plan again

to grant itself unfettered discretion to review all questions arising under the plan. *Id.* at 887. The plaintiff claimed he was injured by the employer's grant of additional discretion under the amendment. The Seventh Circuit held that the plaintiff had demonstrated an injury-in-fact even though the employer had not yet adversely exercised its discretion toward him. The court stated:

> By adding language that granted itself discretionary authority to determine eligibility under and to construe the Plan, Allsteel increased the likelihood that [plaintiff] will, at some point, be denied benefits under the Plan. This correspondingly decreased the certainty of his Plan entitlements, *causing him immediate injury*. Thus we conclude that [plaintiff] has sufficiently alleged injury-in-fact.

Id. at 890 (emphasis added).

Allsteel is easily distinguishable. King's return to Covered Employment in 1998, after the date according to the District Court that the split-rate amendment applied to the Standard Pension, meant that the split-rate amendment not only did not injure him immediately by reducing his accrued benefit upon his return, but also that the amendment would *never* injure him. This is so because until he returned to Covered Employment, as the District Court found, his benefits were determined under the Plan in effect in 1976 when he first terminated Covered Employment. (Pet'r App. at 27a-28a). Thus, Petitioner here differs from the plaintiff in *Allsteel* who could demonstrate a genuine prospective injury to him, *i.e.*, the potential narrowing of *his* own entitlement to benefits in the future. Unlike Petitioner here,

the plaintiff in *Allsteel* did not argue that *another* plan participant could have benefits denied in the future under the amended discretionary standard. Since Petitioner here has no actual or threatened cut-back, *Allsteel* is not inconsistent with the Panel's decision.

Allsteel is also readily distinguishable on its facts with respect to Petitioner's backloading claim. King argues that under the Seventh Circuit's analysis in *Allsteel* he would be allowed to challenge the repair feature of the split-rate provision as causing unlawful backloading, but that the Second Circuit requires him instead to face an imminent injury in order to have standing. In fact, however, the Second Circuit's summary order does not require imminent deterrence from leaving Covered Employment in order to raise a backloading challenge to the repair. Instead, it simply held on the specific facts of the case that King lacked standing because, unlike the plaintiff in *Allsteel*, King would never have the potential problem of being deterred from leaving Covered Employment even in the future as he had already left Covered Employment. Nothing in the Second Circuit's decision precludes a current employee, even one with only one or a few years of credit, from complaining that he could potentially be deterred from leaving employment in the future because of a backloaded plan design that requires him to continue working in order to reap the full value of his earlier service. King was not in that position because he had terminated Covered Employment

In any event, even if King had standing to argue that the repair feature makes an otherwise lawful split-rate provision unlawful, no authority supports Petitioner's view that the repair feature results in improper backloading. Other than the District Court, no court has considered such a challenge,

and the District Court's holding that the repair feature did not cause backloading because it does "concentrate the accrual of benefits on any fixed tenure of employment or on a benchmark linked to the approach of retirement, but rather focus[es] on a wholly different feature: the length of the ill-timed (in hindsight) break in service" was correct. (Pet'r App. at 36a-37a).

The three statute of limitation cases relied upon by King also fail to prove a conflict between circuit courts in need of resolution by the Supreme Court. In those cases, it was undisputed that the plaintiffs, unlike King, were harmed by the challenged act, and the only question was whether the statute of limitations began to run on the date the potential for injury first existed or on the date of the actual injury. *See Larson v. Northrop Corp.*, 21 F.3d 1164, 1170-72 (D.C. Cir. 1994) (statute of limitations began to run on date that defendants purchased insufficient annuity contract and not on date of payment under contract); *Int'l Union of Electronic, Electric, Salaried, Machine and Furniture Workers, AFL-CIO v. Murata Erie North America, Inc.*, 980 F.2d 889, 898-99 (3d Cir. 1992) (limitations period began on date of adoption of unlawful amendment); *Gluck v. Unisys Corp.*, 960 F.2d 1168, 1178-79 (3d Cir. 1992) (same). Like Petitioner's misplaced reliance on *Allsteel*, these cases do not conflict with the Second Circuit's decision that Petitioner lacked standing since Petitioner, alone, unlike the plaintiffs in the cited cases, did not have any actual or threatened injury. None of these cases supports King's novel proposition that an allegedly unlawful action need not have any actual or threatened effect on the plaintiff for there to be standing, or that the plaintiff can challenge the action based solely on its effect on someone else.

The fourth case cited by King to support his conflict claim is completely inapposite as it involves a prohibited transaction under ERISA, a *per se* statutory violation that does not require any showing of injury. *Ziegler v. Connecticut General Life Ins. Co.*, 916 F.2d 548, 550-52 (9th Cir. 1990) (limitations period began to run when plan entered into unlawful arrangement with investment manager, and not when unlawful act actually occurred under agreement). Finally, King's suggestion that the Panel's decision conflicts with a prior Second Circuit decision is not a basis for this Court's review as conflicting decisions within the same circuit can be resolved within the circuit.

III. Granting The Petition Would Not Increase King's Benefits

King erroneously assumes that, if the Second Circuit had allowed him to challenge the nonparties' benefit calculations and if it agreed that Pensioner #1's benefit was improperly cut back or that Pensioner #2's benefit was improperly backloaded, King would be entitled to additional benefits because the entire split-rate provision would have to be struck from the Plan. King's mistaken belief is refuted by the text of ERISA which does not require the wholesale invalidation of the split-rate amendment even if it were unlawfully applied to two participants.[5] If, in

5. Unlike other ERISA provisions, ERISA's cut-back rule, Section 204(g)(1), provides that an amendment that reduces any participant's accrued benefit simply cannot be applied to such individuals. 29 U.S.C. § 1054(g)(1) ("The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 302(c)(8) or section 4281."). Other sections of ERISA prohibit the amendment entirely. For example, ERISA Section 302(c)(8), an exception to the

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fact, the split rate could not be used to calculate Pensioner #1's benefit given that he returned to Covered Employment prior to 1995, the remedy would be to calculate Pensioner #1's benefit using the higher rate. This result would not affect King's benefit since he did not return to Covered Employment until 1998. Similarly, if Pensioner #2's benefit were backloaded because he satisfied the conditions of the repair and obtained the retroactive increase for all his pension credit, the remedy would be to either eliminate the repair or modify it so that it conformed

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cut-back prohibition, expressly stipulates that if certain conditions are not met, the amendment is inoperative as to anyone.

> No amendment described in this paragraph which reduces the accrued benefits of any participant shall take effect unless the plan administrator files a notice with the Secretary notifying him of such amendment and the Secretary has approved such amendment or, within 90 days after the date on which such notice was filed, failed to disapprove such amendment.

29 U.S.C. § 1082(c)(8).

Similarly, ERISA Section 204(h), which precludes a plan from reducing the rate of future accruals absent advance written notice, explicitly prohibits the amendment without the notice. 29 U.S.C. § 1054(h) ("An applicable pension plan may not be amended so as to provide for a significant reduction in the rate of future benefit accrual unless the plan administrator provides the notice described in paragraph (2) to each applicable individual (and to each employee organization representing applicable individuals)"). King's exclusive reliance upon Treas. Reg. § 1.411(d)-3(b), which states that "a plan is not a qualified plan . . . if a plan amendment decreases the accrued benefit of any plan participant. . . .", to support his contrary view is misplaced because the regulation does not state that the amendment could not be applied to any participant. It states that the plan may be subject to disqualification. King is not challenging the Plan's tax qualification, but seeking additional benefits.

to the 133-1/3 percent test. There is no basis for King's proposition that the remedy would be to apply the repair to all participants who return to Covered Employment after an absence without satisfying the conditions of the rule.

IV. The Case Was Correctly Decided

A. King Has No Actionable Injury

King tries to portray his case as sufficiently important to justify review by invoking this Court's decision in *Varity Corp. v. Howe*, 516 U.S. 489, 506 (1996), in which the Court held that lying is inconsistent with ERISA's fiduciary duties. In the first instance, the conduct found actionable in *Varity* (intentionally deceiving employee-participants about the financial security of a newly formed subsidiary and its new benefit plans to induce them to transfer to a worthless company with no long-term ability to provide benefits) in no way compares to the conduct challenged by King (the Joint Board's advising Petitioner, consistent with its interpretation and application of the Plan for more than ten years, that a plan amendment became effective in 1989 and the Joint Board's producing a document drafted in 1995 retroactive to 1989 in response to King's request for a 1992 plan document).

King's argument that the Joint Board's response to his request for a 1992 plan document constitutes a *Varity*-type fiduciary misrepresentation claim also fails because regardless of whether King relied on the alleged misrepresentation — which he admits he did not — he was not injured, even according to his definition of injury (that is, deciding not to sue). Because King did litigate and was

not injured, the underlying purpose of providing a judicial remedy for fiduciary misrepresentations — that is, to put an injured participant in the position he or she would have been in but for the misrepresentation — would not be served here. Petitioner fails to cite, and Respondents are not aware, of a single case in which a participant has prevailed on a fiduciary misrepresentation claim in the absence of any injury, and nothing in *Varity* would excuse the injury requirement for such claims. *Varity*, 516 U.S. at 512 (holding that Section 502(a)(3) offers appropriate equitable relief *"for injuries* caused by violation that § 502 does not elsewhere adequately remedy." [emphasis added]).

Furthermore, the injury that King suggests that a "less litigious" participant could have suffered — choosing not to litigate — is not the type of injury that the Court found actionable in *Varity*. He does not allege that the Joint Board's alleged misleading response in any way affected any action he did or could take to qualify for or obtain benefits, but only looks only at a speculative impact on litigation.

In *Varity*, as in other misrepresentation cases under Section 502(a)(3), the plaintiff has been deprived of a particular benefit by virtue of an alleged misrepresentation. Here, even if the Joint Board's response to King's document request constituted a fiduciary misrepresentation, which Respondents deny, the impact of such a response on the participant's decision whether to sue a plan and its administrator is not the injury sought to be remedied in ERISA misrepresentation cases. As noted in *Sampson v. Rubin*, No. Civ.A. 00-10215-DPW, 2002 WL 31432701, *11 (D. Mass. Oct. 29. 2002), "[t]he goal of ERISA is not to

protect litigants but to assist participants in making informed choices about their [benefit] arrangements." *Id.* (citation omitted).

B. King's View of Standing Would Eviscerate ERISA's Exhaustion Requirement

It is well-settled that, absent very limited circumstances, participants seeking benefits under ERISA plans must exhaust administrative remedies prior to filing suit, and indeed King availed himself of the Plan's administrative appeal process. *See, e.g., Davenport v. Harry N. Abrams, Inc.*, 249 F.3d 130 (2d Cir. 2001). In this case, the benefit calculations of Pensioner #1 and Pensioner #2 have not been reviewed in any administrative appeal, but King nonetheless seeks to have the Second Circuit review them in the first instance. King's novel argument that he has standing to challenge for the first time in a federal appeals court the benefits awarded to nonparties who have not challenged their own benefit awards through the Plan's administrative appeal process leads to the anomalous result that only plaintiff-participants would be required to exhaust administrative remedies, and that federal courts could act as substitute plan administrators for challenges raised by litigants as to nonparties. *See Peterson v. Cont'l Cas. Co.*, 282 F.3d 112, 117 (2d Cir. 2002) (vacating district court's benefit eligibility determination when plaintiff had not applied to plan for particular type of benefit) ("ERISA . . . provides no authority for a court to render a *de novo* determination of an employee's eligibility for benefits. Therefore, absent a determination by the plan administrator, federal courts are without jurisdiction to adjudicate whether an employee is eligible for benefits under

an ERISA plan. Consistent with this narrow role for federal courts, all of our past decisions presuppose the existence of an eligibility or claim determination on the part of the plan administrator." [internal citations omitted]). The Second Circuit properly did not countenance such a rescission of the exhaustion requirement.

V. The Factual Dispute Over When The Split-Rate Amendment First Applied To The Standard Pension Makes This Case Inappropriate For Supreme Court Review

King's fiduciary breach and cut-back claims hinge on the resolution of a disputed set of facts involving the date the split-rate amendment became applicable to the Standard Pension. Respondents argued on appeal that the District Court erred in accepting King's contention that it did not apply to the Standard Pension until 1995 because the District Court, like King, mistakenly conflated two different Plan amendments adopted in 1989, and that the applicable arbitrary and capricious standard of review under *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989), required deference to the Joint Board's interpretation of when the split-rate amendment applied to the Standard Pension. However, in view of its standing determination, the Second Circuit never addressed this issue. (Pet'r App. at 3a). The presence of this unresolved contentious factual dispute over a plan-specific issue makes this case inappropriate for Supreme Court review.

VI. King's Request For Statutory Penalties Does Not Present An Issue For Review

The Petition summarily asserts that this Court should also rule on whether the District Court erred in denying his request for statutory penalties under ERISA Section 502(c), 29 U.S.C. § 1132(c). (Pet. at 24). Notably, King neglected to identify this issue in the "Questions Presented" section of the Petition. Additionally, the Second Circuit did not address this issue, and King does not allege a conflict among the courts of appeals on ERISA's statutory penalty provisions. The question of whether to award statutory penalties under ERISA Section 502(c) is a matter left to the District Court's discretion, and whether that discretion was properly exercised does not warrant this Court's review. In any event, the District Court correctly determined that King was not entitled to statutory penalties given that the Joint Board provided King and his counsel with all documents required under ERISA, and King cites to no case that supports his premise that a disagreement between a plan administrator and a participant regarding the effective date of a plan amendment triggers ERISA Section 502(c) penalties. By the express statutory language, the 502(c) penalties come into play only if a plan administrator fails to produce documents. (Pet'r App. at 37a-40a).

In addition, King's simultaneous attempt to obtain both statutory penalties for an alleged violation of ERISA's disclosure obligations under Section 104(b)(4) and "other equitable relief" under the catchall remedy of ERISA Section 502(a)(3) for the same challenged conduct by the Joint Board overlooks this Court's direction that "where Congress elsewhere provided adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief, in

which case such relief normally would not be 'appropriate.'" *Varity*, 516 U.S. at 515; *Mauser v. Raytheon Co. Pension Plan for Salaried Employees*, 239 F.3d 51, 58 (1st Cir. 2001) (declining to recognize a duplicative claim for a fiduciary breach based on an inadequate SPD, citing the general prohibition that courts "should avoid creating duplicative remedies for violations of ERISA's provisions"); *Watson v. Deaconess Waltham Hospital*, 298 F.3d 102, 105 (1st Cir. 2002) (rejecting fiduciary breach claim based on failure to disclose benefit eligibility information) ("When ERISA itself has specified a duty and corresponding remedy, we will impose a further duty on fiduciaries only in very narrow circumstances." [internal citations omitted]).

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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